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DEPARTMENT OF EDUCATION

34 CFR Part 5

RIN 1880-AA89

[Docket ID ED-2019-OS-0083]

Availability of Information to the Public

AGENCY: Office of the Secretary, Department of Education.

ACTION: Final rule.

SUMMARY: The Department of Education ("Department") issues a final rule amending its Availability of Information to the Public regulations to reflect amendments to the Freedom of Information Act ("FOIA") made by the FOIA Improvement Act of 2016 ("Improvement Act") and a minor technical update. Among other things, the Improvement Act requires the Department to amend its FOIA regulations to extend the deadline for administrative appeals for FOIA decisions, add information on dispute resolution services, and amend the way the Department charges fees for FOIA requests.

DATES: These final regulations are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: In this final rule, we are revising sections in 34 CFR part 5 based on statutory amendments to FOIA (5 U.S.C. 552) that were made by the Improvement Act (Pub. Law 114-185) and to make a minor, technical update. The following paragraphs describe the specific statutory changes and the revisions we are making to the regulations.

#### Subpart B—AGENCY RECORDS AVAILABLE TO THE PUBLIC

##### §5.10 Public reading room

Statute: The Improvement Act amended 5 U.S.C. 552(a)(2) to require that each agency ensure that certain categories of records are available for public inspection in an electronic format, rather than available in person for copying, as previously required. The amendments also expanded the categories of records that must be made available for public inspection to include records that have been requested under FOIA three or more times.

Current Regulations: Current §5.10(a) requires the Department to maintain a public reading room containing certain agency records required to be made available for public inspection and copying under FOIA. Current §5.10(b)

provides that the public reading room will include certain categories of records, such as final opinions, orders in adjudications, and agency records released to the public pursuant to a FOIA request and that are likely to be the subject of future FOIA requests. Current §5.10(c) requires the Department to make the reading room records available for inspection electronically.

New Regulations: We are amending §5.10 to reflect the emphasis in 5 U.S.C. 552(a)(2) on electronic inspection for agency records created on or after November 1, 1996, including by renaming the section and reorganizing the requirements. Although the new regulations continue to allow the Department to maintain its reading room, we are revising §5.10 to highlight that the Department is only required to make such records available for public inspection in an electronic format, rather than available in person for copying. In §5.10(a), we are adding to the list of records required to be made available records requested three or more times under FOIA, and, in §5.10(c), we have clarified that, for records created before November 1, 1996, the Department will continue to make hard copies available upon request in accordance with 5 U.S.C. 552(a)(3).

Reason: We are revising §5.10 so it aligns with the Improvement Act.

Subpart C-PROCEDURES FOR REQUESTING ACCESS TO AGENCY RECORDS AND DISCLOSURE OF AGENCY RECORDS

§5.20 Requirements for making FOIA requests

Statute: Under 5 U.S.C. 552(a)(3)(A), a request for records must reasonably describe the records and be made in accordance with published rules stating the time, place, fees, and procedures to be followed. It does not explicitly require a requester to provide contact information upon filing a request.

Current Regulations: Under current §5.20(a), a FOIA request for an agency record must be in writing (via paper, facsimile, or electronic mail) and transmitted to the Department as indicated on the Department's website.

New Regulations: We are adding to §5.20(a) that each request must include a valid email or physical address, and we are omitting reference to the manner in which the submission must be made, as the procedures are specified on the Department's FOIA webpage.

Reason: The Department has received requests without the requester's contact information, which makes it difficult for the Department to transmit the responsive records to the requester as well as to seek clarification regarding

the request, if needed. Further, the Department elects to specify the submission procedures on its FOIA webpage, rather than its regulations, to maintain flexibility to change the procedures to adapt to changing circumstances and best serve the public.

§5.21 Procedures for processing FOIA requests

Statute: The Improvement Act amended 5 U.S.C. 552(a)(6) in several respects. First, under section 552(a)(6)(B)(ii), if a request is extended more than 10 working days from the 20-day processing time limit, the requester has the right to seek dispute resolution services from the Office of Government Information Services. Second, when a requester receives a notice of determination, the requester may seek dispute resolution services from the FOIA Public Liaison.

Current Regulations: The current regulations do not reflect the rights and procedures that were created through the Improvement Act.

New Regulations: We are amending §5.21 to provide requesters with the opportunity to seek dispute resolution assistance from the Office of Government Information Services when a processing extension is more than 10 days after the 20-day time limit. We are also amending §5.21 to require written notification to the requester of the right to seek dispute resolution from the Public FOIA Liaison or

the Office of Government Information Services regarding issues with the processing of the request.

Reason: We are revising §5.21 so it aligns with the Improvement Act.

Subpart D-FEES

§5.32 Assessment of fees

Statute: Under 5 U.S.C. 552(a)(4)(A)(viii)(I), an agency may not generally charge search fees (or, in certain instances, duplication fees) if it has failed to reply to a request within the time limit under section 552(a)(6), except in two instances. First, if unusual circumstances (as described in section 552(a)(4)(A)(viii)(II)(aa) and (bb)) exist, section 552(a)(4)(A)(viii)(II) authorizes an agency to charge search fees (or duplication fees) if it provides timely written notice to the requester in accordance with section 552(a)(4)(A)(viii)(II)(aa) and it complies with the request within 10 days of the end of the 20-day processing period. Second, an agency may charge search fees (or duplication fees) if more than 5,000 pages are necessary to respond to the request and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made at least three good-faith attempts to do so) how the requester could effectively

limit the scope of the request in accordance with section 552(a) (4) (A) (viii) (II) (bb).

Current Regulations: The current regulations allow the Department to charge fees without regard to whether the Department has exceeded the processing time (or a negotiated extension).

New Regulations: We are amending §5.32 so that search fees or duplication fees can be assessed in the event the Department exceeds the processing time only if the requester has been timely advised of unusual circumstances and either: (1) the Department complies with the request within 10 days of the end of the 20-day processing period; or (2) more than 5,000 pages are necessary to respond to the request, and the Department has contacted the requester (or made at least three good-faith attempts) about ways to narrow or revise the scope of the request.

Reason: We are revising §5.32 so it aligns with the Improvement Act.

#### Subpart E-ADMINISTRATIVE REVIEW

##### §5.40 Appeals of adverse determinations

Statute: The Improvement Act amended 5 U.S.C. 552(a) (6) (A) (i) (III) (aa) to require agencies to provide at least 90 days to appeal an adverse determination.

Current Regulations: The current regulations provide a requester with 35 calendar days from the date of an adverse determination letter, issued by the Department, to submit an appeal.

New Regulations: We are amending §5.40 so requesters can file an appeal within 90 calendar days of the date on the adverse determination letter issued by the Department.

Reason: We are revising §5.40 so it aligns with the Improvement Act.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of FOIA, the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f)(1) of Executive Order 12866.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. Because this final rule is not a significant regulatory action, Executive Order 13771 does not apply.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions

governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things, and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these final regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with the Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The final regulations are not expected to have a significant impact because they are designed to merely

implement statutory changes to the FOIA process. These changes relate to the procedures we use for administering the FOIA program, and the additional burden they impose on our stakeholders or the Department, if any, is minor.

Waiver of Proposed Rulemaking and Delayed Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, the APA provides that an agency is not required to conduct notice and comment rulemaking when the agency for good cause finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b) (B). Rulemaking is "unnecessary" when "the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."

Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001), quoting U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947) and South Carolina v. Block, 558 F. Supp. 1004, 1016 (D.S.C. 1983). These regulations merely reflect statutory changes or make minor changes to agency procedure and do not establish or affect substantive policy.

Therefore, under 5 U.S.C. 553(b) (B), the Secretary has determined that proposed regulations are unnecessary.

The APA generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d) (3)). As previously stated, because the final regulations merely reflect statutory changes and minor changes to agency procedure, there is good cause to waive the delayed effective date in the APA and make the final regulations effective upon publication.

#### Regulatory Flexibility Act Certification

The Regulatory Flexibility Act does not apply to this rulemaking because there is good cause to waive notice and comment under 5 U.S.C. 553.

#### Paperwork Reduction Act of 1995

The final regulations do not create any new information collection requirements.

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List of Subjects in 34 CFR Part 5

Freedom of information.

Dated: December 6, 2019.

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Betsy DeVos,  
*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary amends part 5 of title 34 of the Code of Federal Regulations as follows:

PART 5—AVAILABILITY OF INFORMATION TO THE PUBLIC

1. The authority citation for part 5 is revised to read as follows:

AUTHORITY: 5 U.S.C. 552, 20 U.S.C. 1221e-3, and 20 U.S.C. 3474.

2. Section 5.10 is amended by revising paragraphs (a) through (c) to read as follows:

§5.10 Agency records.

(a) *Electronic inspection.* (1) Pursuant to 5 U.S.C. 552(a)(2), the Department makes available for public inspection in an electronic format the following records created on or after November 1, 1996:

(i) Final opinions and orders in adjudications;

(ii) Statements of policy and interpretations adopted by the Department and not published in the *Federal Register*;

(iii) Administrative staff manuals and instructions affecting the public; and

(iv) Copies of all agency records regardless of form or format released to the public pursuant to a FOIA request

that the Department determines are likely to be the subject of future FOIA requests or have been requested three or more times.

(2) The Department currently makes the agency records described in paragraph (a)(1) of this section available for public inspection in an electronic format through its electronic reading room located on the Department's FOIA Web site at

<http://www2.ed.gov/policy/gen/leg/foia/readingroom.html>.

(b) *Public reading room.* The Department may maintain a public reading room containing the agency records described in paragraph (a)(1) of this section. The Department's public reading room is currently located at the National Library of Education, 400 Maryland Avenue, SW, Plaza Level (Level B), Washington, DC 20202-0008. To visit the public reading room, members of the public can contact the Department's FOIA Service Center via email at [EDFOIAManager@ed.gov](mailto:EDFOIAManager@ed.gov).

(c) *Hard copies.* For any agency records that are not made available for public inspection in the *Federal Register* or pursuant to paragraph (a) of this section, the Department will, upon request, provide hard copies in accordance with 5 U.S.C. 552(a)(3).

\* \* \* \* \*

3. Section 5.20 is amended by revising paragraph (a) to read as follows:

§5.20 Requirements for making FOIA requests.

(a) *Making a FOIA request.* Any FOIA request for an agency record must be in writing, must include a valid electronic mail or physical address, and must be transmitted to the Department as indicated on the Department's website. See [www.ed.gov/policy/gen/leg/foia/request\\_foia.html](http://www.ed.gov/policy/gen/leg/foia/request_foia.html).

\* \* \* \* \*

4. Section 5.21 is amended by:

- a. Revising paragraphs (e) introductory text and (g).
- b. Redesignating paragraph (h) (2) (ii) (E) as paragraph (h) (2) (ii) (G).
- c. Adding new paragraphs (h) (2) (ii) (E) and (F).

The revisions and additions read as follows:

§5.21 Procedures for processing FOIA requests.

\* \* \* \* \*

(e) *Extension of time period for processing a FOIA request.* The Department may extend the time period for processing a FOIA request only in unusual circumstances, as described in paragraphs (e) (1) through (3) of this section, in which case the Department notifies the requester of the extension in writing. For extensions of more than 10

additional working days, the Department must also notify the requester, in writing, of the right to seek dispute resolution services from the Office of Government Information Services. A notice of extension affords the requester the opportunity either to modify its FOIA request so that it may be processed within the 20-day time limit, or to arrange with the Department an alternative time period within which the FOIA request will be processed. For the purposes of this section, unusual circumstances include:

\* \* \* \* \*

(g) *Notification of determination.* Once the Department makes a determination to grant a FOIA request in whole or in part, it notifies the requester in writing of its decision and of the right to seek assistance from the Department's FOIA Public Liaison.

(h) \* \* \*

(2) \* \* \*

(ii) \* \* \*

(E) A statement notifying the requester of the right to seek assistance from the Department's FOIA Public Liaison.

(F) A statement notifying the requester of the right to seek dispute resolution services from the Department's

FOIA Public Liaison or the Office of Government Information Services.

\* \* \* \* \*

5. Section 5.32 is amended by adding paragraph (b) (4) to read as follows:

§5.32 Assessment of fees.

\* \* \* \* \*

(b) \* \* \*

(4) If the Department has failed to comply with any time limit in 5 U.S.C. 552(a) (4) (A) (viii) (I), the Department may not assess search fees, except as otherwise provided in this paragraph. If the Department has determined that unusual circumstances (as described in §5.21(e)) apply, it may assess search fees (or, for requesters with preferred fee status, it may assess duplication fees) if the Department gives the requester timely written notice under §5.21(e) and responds to the FOIA request within 10 additional working days. If unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the Department may assess search fees (or, for requesters with preferred fee status, duplication fees) if the Department gives the requester timely written notice under §5.21(e) and the Department discussed with the requester via written mail, electronic

mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request.

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§5.40 [Amended]

6. Section 5.40 is amended by removing the number "35" and adding "90" in its place in the first sentence of paragraph (b).

[FR Doc. 2019-26705 Filed: 12/11/2019 8:45 am; Publication Date: 12/12/2019]